

ORIGINAL

Supreme Court, U.S.  
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CASE NO. 98-5410

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM DUANE ELLEDGE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

\*\*\*\*\*  
ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF FLORIDA  
\*\*\*\*\*

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether the delay in carrying out the death sentence in this case violates the prohibition against cruel and unusual punishment and the Eighth Amendment to the United States Constitution.

II.

Whether the Florida Supreme Court's statement that the trial court's affirmative reliance on false information is harmless error violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

III.

Whether Florida's felony murder aggravating circumstance does not genuinely narrow the class of persons eligible for the death penalty as required by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM DUANE ELLEDGE,  
  
Petitioner,  
  
v.  
  
STATE OF FLORIDA,  
  
Respondent.

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OPINION BELOW

The decision of the Florida Supreme Court in Elledge v. State, 706 So.2d 1340 (Fla. 1997), is set out in Petitioner's appendix to his petition.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257. The modified opinion of the Florida Supreme Court following rehearing was rendered March 5, 1998. Elledge v. State, *supra*. Petitioner's request for extension of time dated May 19, 1998, was granted by the Court until July 23, 1998.

#### PROVISIONS OF LAW

Respondent accepts Petitioner's provisions of law as set forth in the petition.

#### STATEMENT OF THE CASE AND FACTS

Elledge confessed to the rape and murder of Margaret Ann Strack and the murder and robbery of Edward Gaffney in Hollywood, Florida; and the murder and robbery of Kenneth Nelson in Jacksonville, Florida, between August 24 and August 26, 1974.

On October 30, 1974, Elledge pled guilty to the murder of Kenneth Nelson in Jacksonville, Florida, and was sentenced to life imprisonment. On March 17, 1975, Elledge pled guilty to the rape and murder of Miss Strack. Subsequently, Elledge pled guilty to the murder and robbery of Edward Gaffney and was sentenced to life imprisonment. On March 18, 1975, Elledge was sentenced to death following a jury's death recommendation by a vote of 11 to 1, of the murder and rape of Miss Strack.

On appeal, the Florida Supreme Court reversed the sentence and remanded the case for a new sentencing hearing, Elledge v. State, 346 So.2d 998 (Fla. 1977). Elledge was again sentenced to death on remand and that sentence was affirmed by the Florida Supreme Court, Elledge v. State, 408 So.2d 1021 (Fla. 1982).

In his collateral attack to the judgment and sentence of death, Elledge questioned the voluntariness of his guilty plea and alleged ineffectiveness of trial counsel. Relief was denied in

Elledge v. Graham, 432 So.2d 35 (Fla. 1983), cert. denied, 464 U.S. 986 (1983). Subsequently, Elledge received federal habeas corpus relief from the Eleventh Circuit in Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), reh'g granted in part, 833 F.2d 250 (11th Cir. 1987) (based on the possibility the jury may have observed Elledge's shackles at the penalty hearing).

A third sentencing proceeding was held in 1989, at which time Elledge was again sentenced to death following a new sentencing proceeding before a jury. On appeal, the death sentence was vacated, Elledge v. State, 613 So.2d 434 (Fla. 1993), based on sentencing deficiencies.

On June 10, 1993, prior to the fourth resentencing, Elledge again attempted to withdraw his earlier plea of guilty. That request was denied and on November 1, 1993, a new sentencing jury was empaneled to entertain a new sentencing proceeding. On November 19, 1993, the jury recommended that Elledge be sentenced to death for the murder of Margaret Ann Strack by a vote of 9 to 3. Written memoranda was requested of both sides with regard to sentencing issues and, at the request of the defense, additional opportunity was given Elledge to be heard on January 28, 1994, regarding the appropriateness of the sentence. On February 4, 1994, the trial court again sentenced Elledge to death. The aggravation found by the trial court included that the defendant had been previously convicted of another capital felony or a felony

involving the use or threat of violence to a person, §921.141(5)(b), Fla.Stat.; that the capital felony was committed while Elledge was engaged in the commission of or attempt to commit, or escape after committing a rape (sexual battery), §921.141(5)(d), Fla.Stat.; the capital felony was committed for the purpose of avoiding or preventing a lawful arrest, §921.141(5)(e), Fla.Stat., and the capital felony was especially heinous, atrocious or cruel, §921.141(5)(h), Fla.Stat., in particular:

The Defendant's own statement proves that the strangulation of Margaret Ann Strack continued for approximately fifteen [15] minutes. The evidence established that after the victim threatened to tell the police that the Defendant had or attempted to rape her, he grabbed her by the throat and choked her to death, while at the same time sexually forcing himself on her. The Defendant's statement and testimony of the medical examiner, Dr. Fatteh, clearly established that the victim fought in vain for her life.

She struggled against the Defendant, fought for air and hit the walls with her arms. The Defendant then pulled her off the bed and onto the floor, where he continued choking her with both hands until she was dead. Dr. Fatteh testified that Margaret Ann Strack's cause of death was asphyxiation due to strangulation. He testified that she would have lost consciousness within (1) to (2) minutes of the choking.

The Defendant's statement, however, suggests that her struggle for life may have lasted even longer as he raped and choked her for approximately (15) minutes. It was only after she turned purple, her eyes rolled into the back of her head, she stopped struggling, and gave a last short gasp for air, that he released his strangle hold on her. . . .

The Court finds that the State has clearly proven, beyond a reasonable doubt, that Margaret Ann Strack's death was committed in the especially heinous, atrocious or cruel manner. Therefore, this aggravating circumstance is applicable.

(TR 3752-3753).

The trial court found the following statutory and nonstatutory mitigating circumstances established by a preponderance of the evidence. In reviewing each of the statutory mitigating circumstances found in §921.141(6), Fla.Stat., the court observed that none of those factors were proven by a preponderance of the evidence. With regard to nonstatutory mitigating circumstances, the court went through the following:

1. Family Background.

The Court finds it has been established that the defendant had a difficult and abusive childhood by a preponderance of the evidence. However, this factor is given little weight by the Court.

(TR 3762).

2. Remorse, Cooperation And Confession.

The Court finds that the defendant has not demonstrated any remorse for the murder of Margaret Ann Strack, thereby failing to establish this mitigating circumstance by a preponderance of the evidence.

(TR 3764).

3. Post-Conviction Life.

The trial court rejected that Elledge was a "particularly well-behaved prisoner" (TR 3765), but did find that the evidence

established by a preponderance of the evidence that Elledge had been a good friend, husband and stepfather and a supporter of his family. (TR 3765). The Court concluded that evidence to the contrary was proven during the penalty phase proceeding with regard to prison adjustment:

While on death row, the most restricted and confined environment in the state prison system, the defendant received (19) disciplinary reports and wrote several threatening letters. . . . The applicability of this proposed mitigating circumstance has additionally been refuted by the defendant's own admission in court. The defendant admitted that he still has the same problems 'inside' now as he did at the time of the murders."

(TR 3766).

#### 4. Delay, An Unusual Mitigating Factor.

The trial court concluded:

The defendant has presented additional evidence with respect to this factor in a hearing before this Court on January 28, 1994, subsequent to the jury's recommendation. The essence of this argument was that due to the passage of time, there was difficulty locating and presenting evidence to establish mitigation.

Philip Charlesworth, Chief Investigator for the Public Defender's Office, testified as to the efforts and difficulties encountered in searching for the defendant's past. Assisting him in the investigation were three investigators from his office, investigators from two different out-of-state public defenders' offices, and a private investigator. He and his own investigators traveled many times to other states and found

that information regarding the defendant's background was hard to gather.

The passage of time has obviously played a role in the defendant's difficulties of finding his past in search of evidence of mitigation. However, the Court finds these difficulties are primarily due to the defendant's lifestyle prior to his 1974 arrest in Florida. A contemporaneous search in 1975 would have been virtually as difficult as it was in 1993. The defendant was a drifter, his family moved from place to place, school to school, without establishing strong ties to any community. Also, the defendant testified that he never held a job for more than a week of two. Testimony from a former employer, employees, school friends and neighbors would be essentially meaningless and impossible to obtain then and now.

Clearly the legal history of this case is unprecedented. Since the commission of the murder of Margaret Ann Strack, the defendant has, prior to this proceeding, on three occasions been sentenced to death. He has spent the majority of the last (19) years confined on Florida's death row. During the last (19) years, many of the defendant's relatives have died. Due to his incarceration, the defendant claims he has not had the opportunity to demonstrate to the court his rehabilitation as he had not been part of a free society.

However, this is due to the fact that he was under a sentence of death for the murder of Margaret Ann Strack, to which he entered a plea of guilty in 1975. There is no statute of limitations for the crime of murder in the first degree. F.S., Section 775.15(1). Additionally, the time delay between the offense and the imposition of the sentence does not negate or diminish the conviction for purposes of a capital sentencing proceeding. Melendez v. State, 498 So.2d 1258 (Fla. 1986).

Although it is an interesting issue, more appropriately raised in another form, the fact that defendant has served (19) years on death row plays no part in these proceedings and is not a mitigating circumstance. The court was ordered by mandate to conduct and preside over a new sentencing phase proceeding. The reason for imposing sentence on this defendant in 1994, is no different than the reason for imposition of sentence in 1975: the defendant committed the brutal rape and murder of Margaret Ann Strack in 1974.

(TR 3766-3768).

Elledge's taped confession presents a succinct accounting of the facts surrounding Margaret Ann Strack's death. On Saturday, August 18, 1974, Elledge traveled from Toledo, Ohio, with Paula Fain, who he had planned to marry once he divorced his wife, Diane Elledge. Upon arrival in Hollywood, Florida, they lodged at the Alpine Village Apartments until August 23, when Elledge fought with his fiancé and they split up. He then went out and started drinking that day. Needing a place to stay, he ultimately checked into the Normandy Hotel, Room 3, staying for three nights. He showered and slept until the next afternoon until 2:00 p.m., and then went to the beach and the bars. Elledge recalled in his statement that he was sitting at the bar near the hotel, when a girl came up and started talking to him. He bought drinks. He was drinking Seagrams and 7-Up with no ice and she drank Budweiser. He identified a photograph of the victim Margaret Ann Strack as the girl who was in the bar with him and the person he killed on August 24, 1974. In his statement Elledge observed that he had had 9 to

10 drinks that day and that Miss Strack had had 4 to 5 drinks at the bar. They then left to go smoke some marijuana. Around 5:30 or 6:00 p.m. that evening, they drove to Elledge's hotel in Miss Strack's blue 1967 Camaro convertible. When they got to the hotel, they talked awhile and smoked some marijuana. At some point shortly thereafter, Miss Strack purportedly started to sexually tease Elledge and she "grabbed hold of his joint and played with it." Miss Strack told Elledge that she was not going to do anything and he told her she was. Elledge stated that she had teased him too much and he could not hold back. He grabbed her by the throat with one hand and by the wrist with the other hand. He forced himself on top of her, at which point she pressed her fingernails into his wrist which made him mad. Elledge stated that he choked her as she gasped for air and stopped when she finally agreed to have intercourse. He tried to mount her, however, she again resisted and screamed. He grabbed her by the throat and forced himself into her. She yelled that she would call the police because he was raping her. Elledge said that he choked her screams off completely using his two hands around her throat and Strack started fighting and hitting the wall with her arms. Elledge confessed that he raised her up, choked her and then threw her on the floor. "Totally out of control", he continued to choke her for approximately 15 minutes until she turned purple. Miss Strack's

eyes rolled back into her head, she started to bleed from her nose and Elledge continued to choke her until she was dead.

Elledge waited until it got dark to get rid of the body. He washed Miss Strack's face and cleaned the floor in the bathroom area of the blood. He managed to get her into the trunk of her car, and ultimately dumped her in a church parking lot. After dumping the body, he picked up a hitchhiker with whom he went drinking. Later, driving around, he lost control of the car and smashed it into a fence.

He then ransacked a gas station and gained entry into a Pantry Pride grocery store through an airvent near the roofline. While in the grocery store, he ransacked several areas until he came upon Mr. Gaffney, who was a janitor in the store. His encounter with Mr. Gaffney resulted in Mr. Gaffney being murdered when Elledge fired two shots at a downward angle into Mr. Gaffney. Elledge left the store and walked across the parking lot to the Royal Castle coffee shop where he sat and drank a couple of cups of coffee. He then returned to his room at the Normandy Hotel, slept awhile and then, after rifling through Miss Strack's purse and hiding it, he left. Ultimately, he went to a Greyhound bus station where he caught a bus to Jacksonville, Florida.

Elledge, upon his arrival in Jacksonville, went to the Beacon Motel where he terrorized Mrs. Nelson, her husband and their grandchild, telling them that, "I've already killed two people this

week and one more won't matter. And if you don't believe me, you read the Hollywood papers." While Elledge was ransacking the living quarters of the motel, Mr. Nelson broke loose and went into the hallway. Mrs. Nelson testified at the fourth resentencing that she heard a shot, heard her husband say, "Don't son, you got me", and then heard another shot.

#### REASONS FOR DENYING THE WRIT

##### POINT I

THE DELAY IN CARRYING OUT THE DEATH SENTENCE  
IN THIS CASE DOES NOT VIOLATE THE PROHIBITION  
AGAINST CRUEL AND UNUSUAL PUNISHMENT AND THE  
EIGHTH AMENDMENT TO THE UNITED STATES  
CONSTITUTION.

Elledge first argues that due to the delays in carrying out the sentence of death since March, 1975, when that sentence was first imposed, he has been denied the right to have his sentence carried out in a manner that does not constitute cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution. Citing verbatim from the Memorandum of Justice Stevens, respecting the denial of certiorari in Lackey v. Texas, 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995), and relying on the dissenting opinion of Judge Norris in McKenzie v. Day, 57 F.3d 1461 (9th Cir. 1995), superceded in banc, McKenzie v. Day, 57 F.3d 1493 (9th Cir. 1995), and the dissenting opinion of Judge Fletcher in Ceja v. Stewart, 134 F.3d 1368 (9th Cir. 1998), Elledge argues that both in this country and "our Mother country"

well established Eighth Amendment principles have been violated because of the delays in carrying out the death penalty in his case. Specifically, he asserts "As a result of the abhorrent conditions to which he has been subjected during the last twenty-three years, William Elledge has endured a needlessly lingering form of torturous psychological punishment that, if the State has its way, will culminate in execution." (Petition, pg. 22).

Respondent would submit that although it has been twenty-three years since Elledge first pled guilty to the rape and murder of Margaret Strack, his fourth resentencing proceeding occurred in 1993, culminating in the new imposition of the death penalty. All delays were a result of his "successful litigation" in the appellate courts of Florida and the federal system. As Justice Stevens observed in his Memorandum in Lackey, supra:

Closely related to the basic question presented by the petitioner is a question concerning the portion of the seventeen year delay that should be considered in the analysis. There may well be constitutional significance to the reasons for the various delays that have occurred in petitioner's case. It may be appropriate to distinguish, for example, among delays resulting from (a) a petitioner's abuse of the judicial system by escape or repetitive, frivolous filings; (b) a petitioner's legitimate exercise of his right to review; and (c) negligence or deliberate action by the State. Thus, though English cases indicate that the prisoner should not be held responsible for delays occurring in the latter two categories, see id., at 33, 4 All. E.R. at 786, it is at least arguable that some portion of the time that has elapsed since

this petitioner was first sentenced to death in 1978 should be excluded from the calculus.

Lackey v. Texas, 131 L.Ed.2d at 305-306.

In the instant case, prior to the fourth resentencing, Elledge raised the spectre that his rights were violated in a motion to preclude the death penalty based on delay in carrying out his execution. In Point XII of his brief before the Florida Supreme Court, he concluded: "Of thirty-six (36) people executed under Florida's current statute, none has been on death row as long as Mr. Elledge has. Appendix. The delay in carrying out this execution violates both the Florida and United States Constitutions. A reduction to life is required." (Elledge's Brief, pg. 64). The Florida Supreme Court, in Elledge v. State, supra, observed in footnote 4 that this claim was an issue before the court and concluded summarily that the claim was without merit. Elledge v. State, 706 So.2d at 1347. See also: Porter v. State, 653 So.2d 374, 380 (Fla. 1995) (similar claim rejected for delay of two decades in carrying out sentence); Hitchcock v. State, 578 So.2d 685 (Fla. 1990), reversed on other grounds, \_\_\_ U.S. \_\_\_, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992). Interestingly, the trial court viewed Elledge's assertion in a slightly different perspective by addressing the delay as an unusual mitigating factor. The trial court, at (TR 3766-3768), concluded the following:

The defendant has presented additional evidence with respect to this factor in a hearing before this Court on January 28, 1994,

subsequent to the jury's recommendation. The essence of this argument was that due to the passage of time, there was difficulty in locating and presenting evidence to establish mitigation.

Philip Charlesworth, Chief Investigator for the Public Defender's Office testified as to the efforts and difficulties encountered in searching for the defendant's past. Assisting him in the investigation were three investigators from his office, investigators from two different out-of-state public defenders' and a private investigator. He and his own investigators traveled many times to other states and found that information regarding the defendant's background was hard to gather.

The passage of time has obviously played a role in the defendant's difficulties of finding his past in search of mitigation. However, the Court finds these difficulties are primarily due to the defendant's lifestyle prior to his 1974 arrest in Florida. A contemporaneous search in 1975 would have been virtually as difficult as it was in 1993. The defendant was a drifter, his family moved from place to place, school to school, without establishing strong ties to any community. Also, the defendant testified he never held a job for more than a week or two. Testimony from a former employer, employees, school friends and neighbors would be essentially meaningless and impossible to obtain then and now.

Clearly, the legal history of this case is unprecedented. Since the commission of the murder of Margaret Ann Strack, the defendant has, prior to this proceeding, on three occasions been sentenced to death. He has spent the majority of the last (19) years confined on Florida's death row. During the last (19) years, many of the defendant's relatives have died. Due to his incarceration, defendant claims he has not had the opportunity to demonstrate to the Court

his rehabilitation as he has not been part of a free society.

However, this is due to the fact that he was under a sentence of death for the murder of Margaret Ann Strack, to which he entered a plea of guilty in 1975. There is no statute of limitations to the crime of murder in the first degree. F.S. Section 775.15(1). Additionally, the time delay between the offense and the imposition of the sentence does not negate or diminish the conviction for purposes of a capital sentencing proceeding. Melendez v. State, 498 So.2d 1258 (Fla. 1986).

Although it is an interesting issue, more appropriately raised in another form, the fact that the defendant has served (19) years on death row plays no part in these proceedings and is not a mitigating circumstance. The Court was ordered by mandate to conduct and preside over a new sentencing phase proceeding. The reason for imposing sentence on this defendant in 1994, is no different than reason for imposing sentence in 1975: the defendant committed the brutal rape and murder of Margaret Ann Strack in 1974.

Respondent would submit that although the issue has been preserved for review and is "wrapped" in a federal constitutional-right shroud, the underpinnings of Elledge's claim, that he has spent twenty-three years on Florida's death row in "torture and agony," is unsupported by any meaningful evidence. The record bears out that Elledge has continually litigated the validity of not only his plea of guilty but the appropriateness of the sentence imposed. The fact that protracted litigation has occurred, neither diminishes the validity of the ultimate sentence imposed in 1994, nor supports conclusory rhetoric that his existence in prison was

torturous or in any way exceptional from any other individual who is either sentenced an exorbitant term of years or a life sentence.<sup>1</sup> Respondent would submit that unlike Coker v. Georgia, 433 U.S. 584 (1977), or Enmund v. Florida, 458 U.S. 782 (1982), the sheer passage of time pales as an Eighth Amendment violation in comparison to findings by the Court that, in imposing the death penalty in Coker for rape, or imposing the death penalty in Enmund for merely participating in a robbery during which a killing took place, violate the Eighth Amendment. See Herrera v. Collins, 506 U.S. 390 (1993); Reno v. Flores, 507 U.S. 292 (1993), and Penry v. Lynaugh, 492 U.S. 302 (1989).

Absent some demonstrable evidence that the Eighth Amendment has been violated, Elledge has failed to assert a basis upon which the imposition and affirmance of a fourth death sentence in 1993 for the murder of Margaret Strack should be vacated and he be sentenced to life imprisonment.

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<sup>1</sup> Based on this theory, a death row inmate sentenced to death, whose sentence has not been timely carried out, would be released from incarceration, since the torture and agony was his confinement.

## POINT II

WHETHER THE FLORIDA SUPREME COURT'S STATEMENT THAT THE TRIAL COURT'S AFFIRMATIVE RELIANCE ON FALSE INFORMATION IS HARMLESS ERROR VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Elledge next argues that the Florida Supreme Court erred in performing a harmless error analysis pursuant to Chapman v. California, 386 U.S. 18 (1967), regarding an error by the trial judge when he misspoke and relied on "false information" in rejecting a statutory mitigating circumstance. Respondent would submit that the Florida Supreme Court did an appropriate harmless error analysis and concluded, based on the totality of the facts pertaining to that mitigating factor, that any error was harmless beyond a reasonable doubt. Elledge v. State, 706 So.2d at 1347.

In explaining the reasons for rejecting the statutory mitigating factor, §921.141(6)(b), Fla.Stat., that Elledge was under the influence of extreme mental or emotional disturbance, the trial court misstated what Dr. Caddy, a defense expert, observed about Elledge as to whether he was under the influence of extreme mental or emotional disturbance. The trial court found:

The Court finds the applicability of this mitigating circumstance was rebutted by the defendant's own expert. Dr. Caddy testified, based upon his examination of the defendant, interviews of the family and friends, and, a review of the facts of this case, that it is his expert opinion that the defendant was not under extreme mental or emotional disturbance when he committed the murder of Margaret Ann Strack. (TR 3759).

The record actually reveals that, after a lengthy cross-examination, Dr. Caddy admitted that he disagreed in material part with much of another expert's diagnosis of Elledge. On redirect, Dr. Caddy did state to the jury that Elledge suffered from extreme emotional and mental duress at the time of the crime:

Q: Okay, having had a chance to re-evaluate your position in this case through Mr. Satz's cross-examination other things that were brought to light, may I ask you whether or not you have an opinion within a reasonable degree of psychological certainty as to whether or not the capital felony involving the death of Margaret Ann Strack was committed while William Elledge was under the influence of extreme mental or emotional disturbance? Do you have such an opinion?

A: My opinion is the same now as it was yesterday. My view is that he was operating under extreme emotional duress at the time.

(TR 2374).

Although the trial court did misstate what Dr. Caddy's views ultimately were with regard to whether Elledge suffered from extreme emotional or mental disturbance, the trial court's rejection of this statutory mitigating factor was not premised on that conclusion. Rather, it was premised on the testimony presented by Dr. Stock as to what Elledge's test revealed:

. . . Dr. Stock found that the defendant was malingering, which gave rise to a descriptive result on the MMPI II. The doctor testified that the defendant's average IQ ruled out retardation, which is a primary indicator of fetal alcohol syndrome. Also, contrary to Dr. Schwartz's findings and consistent with Dr. Caddy's, Dr. Stock concluded that the

defendant did not suffer from fetal alcohol syndrome and found no indications of any organicity. Also, the defendant did not suffer from any mental illness, impulse control disorder, or post-traumatic stress disorder. Dr. Stock concluded that the defendant had an anti-social personality disorder. Dr. Stock testified that this is not a mental illness, but a lifelong history of a person who makes bad choices in life and that these choices are conscious and volitional. . . .

The evidence presented does not establish, by a preponderance of the evidence, that the defendant was under the influence of extreme mental or emotional disturbance when the murder of Margaret Ann Strack was committed. As such, the trial court finds that the mitigating circumstance does not apply.

(TR 3759-3760).

The Florida Supreme Court, after reviewing the aforementioned portions of the record, concluded:

On this record, we conclude beyond a reasonable doubt that the trial court's misstatement of Dr. Caddy's views did not affect the outcome. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Elledge v. State, 706 So.2d at 1347.

Moreover, although the trial court rejected as a mitigating factor that Elledge did not suffer from extreme mental or emotional disturbance, the underpinnings of that factor were also considered with regard to nonstatutory mitigation:

It is evident from the sentencing order that the trial court considered both proposed mitigators. The trial court acknowledged that alcoholism influenced Elledge's life, and to the extent that his parents were alcoholic and

he suffered the physical and mental abuse resulting from those circumstances, the court found nonstatutory mitigation. The judge rejected mental health problems as mitigation based on his findings that the statutory mitigators did not apply. The court found Dr. Stock credible when he testified that Elledge suffered no mental illness but had an anti-social personality disorder -- meaning Elledge had a lifelong history of making bad choices which were conscious and volitional . . .

We likewise find that the trial court did not err in its finding 'little weight' to child abuse as a nonstatutory mitigators. The 'weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.' (cites omitted). The trial court found that Elledge had a difficult and abusive childhood, but was influence by testimony revealing that Elledge enjoyed a close relationship with his father:

Both Danny Elledge and Connie Moffett described their father as a kind and wonderful man. Father Ken Roach, former Jacksonville detective, testified that after being apprehended, the defendant spoke by telephone with his father. He said the defendant was very open and emotional with his father during the telephone call.

The trial court did not abuse its discretion 'for we cannot say that no reasonable person would give this circumstance [little] weight in the calculus of this crime.' . . .

706 So.2d at 1347.

In Romano v. Oklahoma, 512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994), the United States Supreme Court concluded on a similar issue:

. . . Contrary to petitioner's assertion, Johnson v. Mississippi, 486 U.S. 578 (1988)], does not stand for the proposition that the mere admission of irrelevant and prejudicial evidence requires the overturning of a death sentence.

Petitioner's argument, pared down, seems to be a request that we fashion general evidentiary rules, under the guise of interpreting the Eighth Amendment, which would govern the admissibility of evidence at capital sentencing proceedings. We have not done so in the past, however, and we will not do so today. The Eighth Amendment does not establish a federal code of evidence to supercede state evidentiary rules in capital sentencing proceedings. (Cite omitted). . . . We believe the proper analytical framework in which to consider this claim is found in Donnelly v. DeChristoforo, 416 U.S. 637, 643, 40 L.Ed.2d 431, 94 S.Ct. 1868 (1974). There we addressed a claim that remarks made by the prosecutor during his closing argument were so prejudicial as to violate the defendant's due process rights. We know that the case was not one in which the state had denied a defendant the benefit of a specific constitutional right, such as the right to counsel, or in which the remarks so prejudiced a specific right as to amount to a denial of that right. (Cite omitted). Accordingly, we sought to determine whether the prosecutor's remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' Ibid. We conclude, after a 'examination of the entire proceedings,' that the remarks did not amount to a denial of constitutional due process. Ibid.

Romano v. Oklahoma, 129 L.Ed.2d at 12-13.

The Court ultimately concluded that, ". . . To hold on the basis of this record that the admission of evidence relating to petitioner's sentence in the Thompson case rendered petitioner's

sentencing proceeding for the Sarfaty murder fundamentally unfair ~~would~~ thus be an exercise in speculation, rather than reasoned judgment." 129 L.Ed.2d at 14.

Likewise, in the instant case, based on the totality of the evidence presented with regard to this statutory mitigating factor, the trial court's misstatement as to his accounting of what Dr. Caddy's conclusions were surplusage and not the compelling reasons given by the trial court for finding that statutory mitigating factor did not exist based on this record. The Florida Supreme Court equally did not err in concluding after reviewing all of the evidence at sentencing that the trial court's misstatements were harmless error beyond a reasonable doubt under State v. DiGuilio, supra, the State's version of Chapman v. California.

### POINT III

WHETHER FLORIDA'S FELONY MURDER AGGRAVATING CIRCUMSTANCE DOES NOT GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AS REQUIRED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Elledge's last argument asserts that the "automatic application of the felony murder aggravating circumstance to a defendant whose first degree murder conviction rests on a felony murder theory fails to genuinely narrow the class of persons eligible for the death penalty under the Eighth Amendment." (Petition, pg. 30). Citing Tennessee v. Middlebrooks, 507 U.S.

1028 (1993), cert. dismissed as improperly granted, Tennessee v. Middlebrooks, 510 U.S. 124 (1993), Elledge argues that the Florida Supreme Court's opinion conflicts with three other states regarding the use of a similar aggravating circumstance citing Engleberg v. Meyer, 820 P.2d 70 (Wyo. 1991); State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), and State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979). Elledge then asserts:

The evidence in this case clearly indicates an impulsive reaction to screaming and frustration from sexual teasing (R 3105-3111). Additionally, there was extensive evidence of intoxication from alcohol and marijuana (R 3110). Indeed, the judge's comments in finding a factual basis for first degree murder indicate that he believed that the fact that the homicide was during a rape was essential to making this a first degree murder. (R 3110-3111). It is unconstitutional to use the fact of a rape to make the offense of first degree murder and to also use it as an aggravator.

(Petition, pgs. 31-32).

The Florida Supreme Court summarily denied without comment this issue on appeal. 706 So.2d at 1347. It should be observed, however, that the Florida Supreme Court has, on a number of occasions, entertained this issue and concluded that the Florida death penalty statute does genuinely narrow the class of persons eligible for the death penalty. Bertolotti v. State, 534 So.2d 386 (Fla. 1988), and see also Johnson v. Dugger, 932 F.2d 1360, 1368-69 (11th Cir. 1991) (relying, on part, upon Lowenfeld to reject argument "that Florida's law, by permitting [a conviction and] a

death sentence to be predicated on a single finding of felony murder, denied, [petitioner] constitutionally adequate sentencing safeguards"), cert. denied, 112 S.Ct. 427 (1991); Bertolotti v. Dugger, 883 F.2d 1503, 1527-28 (11th Cir. 1989) (rejecting challenge to use of felony murder aggravating circumstance in capital felony murder case), cert. denied, 497 U.S. 1032 (1990); Dunlap v. Dugger, 890 F.2d 285, 314, n.38 (11th Cir. 1989) ("Had Dunlap been convicted of felony murder at his first trial, there would be no impediment to a finding of a felony murder aggravating factor at sentencing."), cert. denied, 496 U.S. 929 (1990).

Respondent would submit that the decisions in Jurek v. Texas, 428 U.S. 262 (1976), and Lowenfeld v. Phelps, 484 U.S. 231 (1988), control the disposition of this issue. These cases make clear that as long as the Eighth Amendment narrowing function is satisfied in a capital sentencing scheme, it need not be fulfilled at any particular stage. While not unmindful that this Court has discussed on several occasions the requirement that the Eighth Amendment dictates that "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder,'" Lowenfeld, 484 U.S. at 244 (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983), the narrowing function of the Florida Statutes does advance the Eighth Amendment objective of insuring that sentencing

discretion is "suitably directed and limited so as to minimize the risk of wholly arbitrating capricious action," Gregg v. Georgia, 428 U.S. 153, 189 (1976), and supplies a "meaningful basis for distinguishing few cases in which 'the death penalty' is imposed from the many cases in which it is not." Gregg v. Georgia, 428 U.S. at 198. See also Spaziano v. Florida, 468 U.S. 447, 460, n.7 (1984), and Proffitt v. Florida, 428 U.S. 242 (1976).

In Lowenfeld v. Phelps, supra, the court considered a challenge to the Louisiana capital statute where the only aggravating circumstance found by the jury was identical to an element for the capital offense of first degree murder. In upholding the Louisiana statute, the court held:

The narrowing function required for a regiment of capital punishment may be provided in either of two ways: the Legislature may itself narrow the definition of capital offenses . . . so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.

Lowenfeld, 484 U.S. at 246.

In Lowenfeld, one element of first degree murder under Louisiana law was that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person"; the overlapping aggravating circumstance was that "the offender knowingly created a great risk of death or great bodily harm to more than one person." 484 U.S. at 243. Lowenfeld relied upon

Jurek v. Texas, 428 U.S. 262 (1976), a case where the narrowing function was also performed at the guilt phase by the Texas Legislature's definition of the death-eligible offenses. The Jurek plurality opinion observed that while the Texas capital sentencing scheme -- unlike other capital states -- did not contain a list of statutory aggravating circumstances to be considered by the sentencer, the Legislature's "actions in narrowing the categories of murders for which a death sentence may either be imposed serves much the same person." 428 U.S. at 270.

A comparison with the statutes considered by this Court in Jurek and Lowenfeld demonstrates that the Florida death penalty statute clearly satisfies the Eighth Amendment narrowing requirement. The Florida statute in fact is more stringent than the Texas statute upheld in Jurek as it imposes additional prerequisites (beyond that required by the Eighth Amendment) before any capital defendant may be sentenced to death. First, at the guilt phase, a Florida jury must find that the defendant committed a death-eligible offense and convict of same, specifically first degree murder. Second, at the penalty phase, both the jury and the sentencing judge must conclude that at least one of several enumerated aggravating circumstances has been established beyond a reasonable doubt. One of these aggravating circumstances is that the murder was committed during the commission of an enumerated felony. Finally, the sentencing judge must find the existence of

any mitigating circumstances and determine whether the aggravating circumstances outweigh the mitigating circumstances. This three-step process clearly demonstrates for Lowenfeld purposes:

The use of 'aggravating circumstances' is not an end in itself, but [one] means of genuinely narrowing the class of death eligible persons and thereby channeling the jury's discretion . . .

The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicate one of the elements of the crime does not make this sentence constitutionally infirm.

Lowenfeld v. Phelps, 484 U.S. at 244, 246. See also Tuilaepa v. California, 512 U.S. 967, 129 L.Ed.2d 750, 114 S.Ct. 2630 (1994).

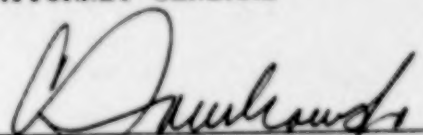
Based on the foregoing, Elledge has failed to demonstrate that Florida's death penalty statute violates the narrowing requirements for death-eligible individuals under the Eighth Amendment.

CONCLUSION

Wherefore, Respondent requests that this Court deny the petition for writ of certiorari in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

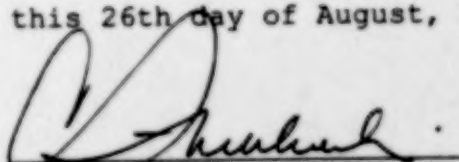
  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Richard B. Greene, Assistant Public Defender, Criminal Justice Building, 6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 26th day of August, 1998.

  
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